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10/037,276	12/31/2001	Ronald L. Edens	17,696	6825

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EXAMINER

KIDWELL, MICHELE M

ART UNIT	PAPER NUMBER
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3761

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/037,276
Filing Date: December 31, 2001
Appellant(s): EDENS ET AL.

Paul Yee
For Appellant

EXAMINER'S ANSWER

MAILED
SEP 28 2004
GROUP 3700

This is in response to the appeal brief filed July 8, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows: The applicant argues that McFall does not teach a labial pad

configuration in which a narrowest portion of the absorbent has a narrowest width situated in the central region of the absorbent, a second widest portion of the absorbent has a second widest width situated in the second end region of the absorbent, and the width of the narrowest portion is smaller than the width of the second widest portion in page 5 of the Appeal Brief. The applicant further states that accordingly the rejection under 35 U.S.C. § 102(e) should be reversed. However, the above referenced limitations have not been rejected under 35 U.S.C. § 102(e). These limitations are found in claim 3, which has been rejected under 35 U.S.C. § 103.

(7) *Grouping of Claims*

The rejection of claims 1 – 18 and 22 – 35 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

6,432,096	MCFALL et al.	8-2002
5,484,429	VUKOS et al.	1-1996

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1 – 2, 5 – 10, 13 – 17, 27 – 28 and 31 – 35 are rejected under 35 U.S.C. 102(e) as being anticipated by McFall et al. (US 6,432,096).

With respect to claim 1, Mc Fall et al. (hereinafter McFall) discloses an absorbent article comprising a fluid permeable cover (42), a liquid impermeable baffle (38) and an absorbent situated between the cover and the baffle (44), the absorbent article having a principal longitudinal axis and a principal transverse axis and being configured to provide a labial pad for disposition within the vestibule of a female wearer (col. 4, lines 22 – 56), the absorbent having a maximum longitudinal length of no greater than about 100 mm extending from a first transverse end to a spaced apart second transverse end (col. 7, lines 10 – 13), a body –facing surface of the absorbent having a minimum longitudinal length that lies generally along the principal longitudinal axis and is less

than the maximum longitudinal length (58 as shown in figure 1), a maximum width of no greater than about 70mm (col. 7, lines 15 – 17), a widest portion, a width at the widest portion, a narrowest portion, a width at the narrowest portion which is smaller than said width at the widest portion, a maximum thickness of no greater than about 10 mm (col. 7, lines 26 – 32), first and second end regions and a central region disposed between the first and second end regions and first and second spaced apart longitudinal sides, the longitudinal sides together with the transverse ends generally forming the periphery of the absorbent, wherein the widest portion of the absorbent is not situated in the central region, and the article is folded parallel to the longitudinal axis prior to disposition within the vestibule of the wearer as set forth in col. 6, lines 29 – 40, col. 13, lines 57 – 59 and figures 1, 4 – 5 and 9.

McFall discloses in col. 2, lines 29 – 33 that the main body portion of the article may be any shape including a triangular shape, which would provide the article with a widest portion of the article in a region not situated in the central region. This configuration also provides the width at a narrowest portion (considered the tip of the triangle) which is smaller than the width at the widest portion (considered the base of the triangle) and also provides the end regions, the longitudinal sides and transverse ends that form the periphery.

With reference to claim 2, the examiner contends that the base of the triangular shaped absorbent article may be considered the widest portion and can also be considered (based on the general knowledge of a triangular shape) to be situated in the first end region.

Regarding claims 5, 13, 16, 31 and 33 – 34, see col. 9, lines 24 – 54 and figures 1 and 4.

Regarding claims 6 and 7, McFall discloses an absorbent article wherein the cover and the baffle have peripheries which extend outward beyond the periphery of the absorbent and are at least partially joined to form an edge as set forth in col. 11, lines 54 – 65.

As to claims 8, 17 and 35, McFall discloses the absorbent further comprising a superabsorbent polymer as set forth in col. 9, line 63 to col. 10, line 14.

Regarding claims 9 – 10 and 27 – 28, see the rejection of claim 1.

As to claim 14, McFall discloses the absorbent comprising a fluid permeable cover as set forth in col. 8, lines 6 – 25.

With reference to claim 15, McFall discloses the cover enclosing the absorbent as set forth in figure 2.

As to claim 32, McFall discloses an absorbent article further comprising a liquid impermeable baffle as set forth in col. 10, lines 46 – 65.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3 – 4, 11 – 12, 18, 22 – 26 and 29 – 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over McFall et al. (US 6,432,096).

The difference between McFall and claim 3 is the provision that the narrowest portion of the absorbent article is situated in the central region of the absorbent and a second widest portion of the absorbent has a width and is situated in the second end region of the absorbent, and said width at the narrowest portion is smaller than said width of the second widest portion of the absorbent.

McFall discloses that the main body portion of the article can be any suitable configuration as set forth in col. 5, lines 29 – 30.

It would have been obvious to one of ordinary skill in the art to modify the configuration of the article provided by McFall to include a dog boned or hourglass shaped configuration because it is well known in the art that either of these configurations are routinely used to provide articles that better conform to the user's anatomy. Either the dog bone or hourglass configuration will provide the structure as claimed by the applicant.

With reference to claims 4, 12 and 30, the examiner contends that either the dog bone or hourglass configuration will provide the structure as claimed by the applicant.

Regarding claims 11 and 29, see the rejection of claim 3.

With reference to claim 18, see the rejection of claims 1 and 3.

With respect to claim 22, McFall discloses an absorbent that has an upper surface and a fluid permeable cover residing on the upper surface of the absorbent as set forth in col. 9, lines 24 – 25.

With respect to claims 23 – 25, see figure 2.

As to claim 26, McFall discloses the absorbent further comprising a superabsorbent polymer as set forth in col. 9, line 63 to col. 10, line 14.

(11) Response to Argument

Applicant's arguments filed July 12, 2004 have been fully considered but they are not persuasive.

In response to the applicant's argument that McFall does not teach a labial pad comprising an absorbent with the claimed maximum and minimum lengths, the examiner disagrees. McFall discloses an interlabial device with a length between 75mm and 105mm (which is about 100 mm as claimed) in col. 7, lines 10 – 13. The length is considered the maximum length because McFall has disclosed this as the length of the device in col. 7, lines 10 – 13.

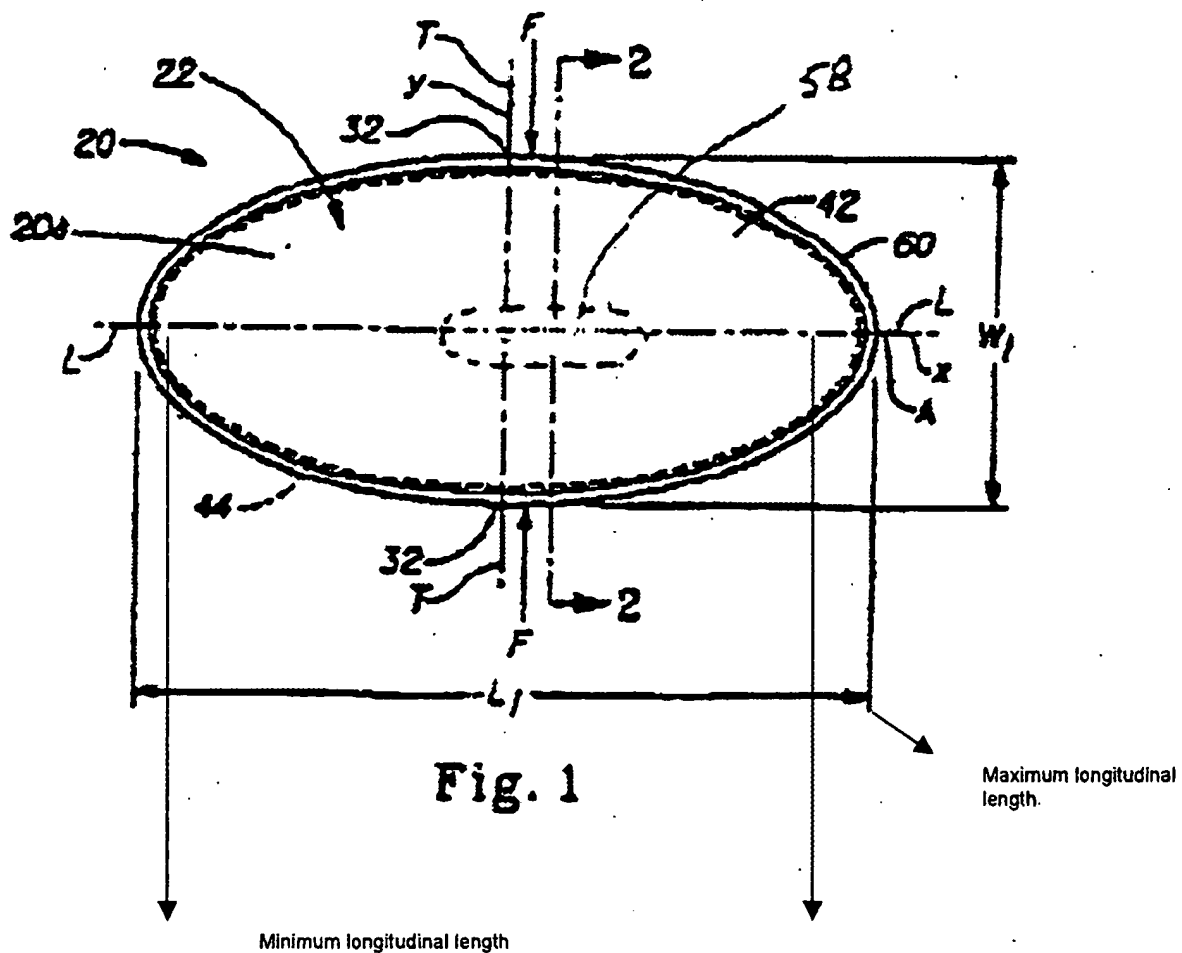
Regarding the minimum length, the examiner notes that the features upon which applicant relies are not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

The applicant argues that McFall does not teach a minimum length that extends along the principal longitudinal axis from the first transverse end to the second transverse end. However, the claim does not require the minimum length to extend along the principal longitudinal axis from the first transverse end to the second transverse end. The claim requires "a minimum longitudinal length (L_{\min}) that lies

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generally along said principal longitudinal axis from said first transverse end area to said second transverse end area..." (emphasis added) .

The term area does not require the minimum length to extend from end to end of the principal longitudinal axis, just to the end area. And, as shown in annotated figure 1 below, McFall provides such a structure.



In response to the applicant's argument that McFall does not teach a labial pad configuration in which the widest portion of the absorbent is situated in the first end region, the examiner disagrees.

McFall discloses in col. 2, lines 29 – 33 that the main body portion of the article may be any shape including a triangular shape, which would provide the article with a widest portion of the article in a region not situated in the central region. Based on the general knowledge of a triangular shape, the examiner contends that this configuration also provides the width at a narrowest portion (considered the tip of the triangle) which is smaller than the width at the widest portion (considered the base of the triangle) and also provides the end regions, the longitudinal sides and transverse ends that form the periphery.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

For example, the knowledge of an hourglass configuration is known to McFall at the time through his incorporation of Vukos et al. (US 5,484,429) in col. 1, lines 59 – 60. Vukos teaches the use of an hourglass shape in combination with an interlabial device, not a conventional sanitary napkin as argued by the applicant, in col. 2, lines 20 – 39 and throughout the disclosure including figure 4.

Additionally, the examiner notes that McFall discloses that any suitable configuration, including a combination of ovoid, elliptical, trapezoidal, rectangular, triangular and/or diamond –shaped is suitable for the main body portion of the interlabial device (col. 5, lines 29 – 40). The applicant seems to interpret such language as being representative of the shape of the sanitary napkin that may be used in combination with the absorbent interlabial device, however, the examiner disagrees. The language at col. 22, lines 22 – 61 of McFall talks about a system in which the absorbent interlabial device may be combined with a sanitary napkin to aid in reducing soiling. There is no mention in this section of suitable configurations for the absorbent interlabial device or the sanitary napkin. However, at col. 5, lines 29 – 40, McFall discloses the suitable configurations with specific reference to the main body portion (22) of the absorbent interlabial device. And, as previously noted, McFall has already disclosed that the absorbent has the same overall shape as the device as set forth in col. 9, lines 61 – 62.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Michele Kidwell

Michele Kidwell
September 23, 2004

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